THE IDC MONOGRAPH:

Prejudgment Interest in Illinois: From the Legislative History to the Legal Challenges

Kristin A. Ahmadian
L&G Law Group, LLP, Chicago

Donald Patrick Eckler
Freeman Mathis & Gary, LLP, Chicago

Steven M. Grossi
Yvonne M. Kaminski & Associates, Chicago

Untress L. Quinn
Armstrong Teasdale, LLP, St. Louis

Prejudgment Interest in Illinois: From the Legislative History to the Legal Challenges

The Illinois legislature recently brought prejudgment interest to Illinois personal injury and wrongful death cases. The new section 2-1303(c) of the Code of Civil Procedure, 735 ILCS 5/2-1303, has sparked controversy from the turbulent legislative process to the ongoing legal challenges. This Monograph first looks to the legislative process that produced section 2-1303(c). It then turns to the pertinent provisions of the law and some areas of uncertainty that remain unresolved. Finally, the relative positions of the litigants in a pending constitutional challenge to section 2-1303(c) are summarized in this in-depth look at prejudgment interest in Illinois.

Legislative History

Around 3:00 a.m. on January 13, 2021, a bill providing for prejudgment interest in Illinois passed both houses of the Illinois General Assembly when the Illinois House of Representatives concurred with Senate Amendment 1 to House Bill 3360.[1] Not 48 hours before, during a lame-duck session, HB3360 (which originally dealt with mortgage foreclosure and passed the House), was rewritten after its second reading; via Senate Amendment 1, the bill now amended 735 ILCS 5/2-1303 and implemented prejudgment interest in Illinois personal injury and wrongful death cases.[2345]

This first iteration of the prejudgment interest bill provided for prejudgment interest at a rate of 9% per year running from the date that the defendant had notice of an injury, which could be established through either the incident itself or written notice.[6] For personal injury or wrongful death actions occurring before the effective date, prejudgment interest was to begin running from the "later of the effective date *** or the date the alleged tortfeasor has notice of the injury."[7] Prejudgment interest under HB3360 would run during the period when the plaintiff voluntarily dismissed a case and would be *unlimited*, meaning that a disabled person or minor could have prejudgment interest that amounted to a multiple of the judgment amount (since persons with such claims have such a significant number of years to bring their claims, and thus to allow interest to accrue).[8]

It first seemed—after the bill was passed and sent to Governor Pritzker on February 4, 2021—that it would be signed. But in the period that followed,

About the Authors

Kristin Ahmadian is a Partner at *L&G Law Group LLP*. She represents physicians, nurses, hospitals, and insurers in complex medical malpractice litigation, including obstetrical cases involving fetal death and disabled minors. Ms. Ahmadian also provides corporate guidance for private companies, insurers, medical groups, hospitals, and physicians regarding compliance with the Illinois Personal Information Protection Act (PIPA), the Illinois Biometric Information Privacy Act (BIPA), and HIPAA.

Steven M. Grossi is an attorney with *Yvonne M. Kaminski & Associates*, in Chicago. He is an experienced trial attorney with a practice focused on the defense of automobile negligence and premises liability matters. Mr. Grossi graduated from the University of Illinois at Urbana-Champaign, where he earned both his J.D. and B.A with a double major in economics and psychology. This article is written in his individual capacity, and the views expressed herein do not necessarily reflect the view and position of State Farm or any other person or entity.

Donald Patrick Eckler is a partner at *Freeman, Mathis, & Gary, LLP*, handling a wide variety of civil disputes in state and federal courts across Illinois and Indiana. His practice has evolved from primarily representing insurers in coverage disputes to managing complex litigation in which he represents a wide range of professionals, businesses and tort defendants. In addition to representing doctors and lawyers, Mr. Eckler represents architects, engineers, appraisers, accountants, mortgage brokers, insurance brokers, surveyors and many other professionals in malpractice claims.

Untress "Trez" Quinn is a partner and seasoned trial lawyer at *Armstrong Teasdale LLP*, focusing his practice on the defense of medical malpractice and other catastrophic loss lawsuits. He has defended multiple complex litigation cases in both state and federal courts involving civil rights, product liability, medical malpractice and wrongful death claims. Mr. Quinn serves as the Diversity Committee Chair for the Illinois Association for Defense Trial Lawyers and has been recognized by Leading Lawyers℠, National Black Lawyers Top 100, and received the NAACP's 54th Freedom Fund Awards for Excellence in Law.

a groundswell of opposition grew, especially from the medical community. As the possibility of a veto increased, the proponents of prejudgment interest began to offer fixes and options to the governor.

The first attempt was on March 16, 2021, with House Amendment 1 to Senate Bill 72, which only would have taken effect if HB3360 had been signed into law.[910] By this amendment, SB72 (a bill that, as originally filed, would have created the Electronic Wills and Remote Witnesses Act) was rewritten to provide for prejudgment interest at a rate of 7% per year, and which conditioned that the interest would not begin to accrue until an action was filed.[11] This version of SB72, which passed the Illinois Senate after being read three times,[12] also did not satisfy Governor Pritzker. Negotiations continued.

On March 18, 2021, House Amendment 2 to SB72 was introduced.[13] This was a standalone bill, not contingent on the governor signing HB3360.[14]

That same day, after only one reading of House Amendment 2 to SB72, the House passed the amended prejudgment interest bill and sent it to the Senate for concurrence.[15] On March 25, 2021, coinciding with the governor's veto of HB3360, the Senate concurred with this amendment to SB72 without any additional readings.[16]

In vetoing HB3360, Governor Pritzker explained that while he supported joining the majority of states that allow prejudgment interest in personal injury cases in order to encourage prompt resolution, HB 3360 would be "burdensome for hospitals and medical professionals beyond a national norm, potentially driving up healthcare costs for patients and deterring physicians from practicing in Illinois."[17]

In vetoing HB3360, Governor Pritzker explained that while he supported joining the majority of states that allow prejudgment interest in personal injury cases in order to encourage prompt resolution, HB 3360 would be "burdensome for hospitals and medical professionals beyond a national norm, potentially driving up healthcare costs for patients and deterring physicians from practicing in Illinois."

Governor Pritzker also stated:

> HB 3360 would allow for prejudgment interest to be calculated on non-economic damages such as pain and suffering and loss of normal life. Again, when we compare this legislation to states that have prejudgment interest, many of them exclude non-economic damages from the calculation. For example, the prejudgment interest statutes in Massachusetts and Minnesota limit the application of prejudgment interest in personal injury cases to pecuniary damages. Minnesota law explicitly excludes future, punitive or non-compensatory damages.[18]

Notwithstanding these criticisms, the bill that the governor signed into law on May 28, 2021—House Amendment 2 to SB72—allowed several of the very things that he opposed in his veto message.[19] That bill, which ultimately became Public Act 102-0006, contained the following provisions:

1. Prejudgment interest in personal injury and wrongful death actions.
2. A prejudgment interest rate of 6% per year that does not apply to punitive damages, sanctions, statutory attorneys' fees, or statutory costs.
3. Prejudgment interest does not apply to the portion of the judgment that does not exceed the highest written settlement offer made within one year of the date that the action was filed or one year after the effective date, whichever is later. If the judgment does not exceed the qualifying settlement offer, then no prejudgment interest is awarded.

— Continued on page 4

4. Prejudgment interest stops accumulating in all cases after five years.
5. Prejudgment interest is tolled from the time an action is voluntarily dismissed until it is refiled.
6. Prejudgment interest begins to run on the date that an action is filed for actions filed after July 1, 2021, and on July 1, 2021, for all cases pending as of that date.
7. Public entities are not subject to prejudgment interest.[20]

> If the judgment is greater than the highest qualifying offer, then the plaintiff gets prejudgment interest only on the difference between the judgment amount and qualifying offer amount.[43] In contrast, if the judgment is less than or equal to the highest offer, then the plaintiff does not get prejudgment interest.

The procedural process that occurred raises several constitutional questions. Article IV, Section 8(d) of the Illinois Constitution provides, in relevant part, that: "A bill shall be read by title on three different days in each house."[21] SB72 had three readings in the Senate as a bill concerning electronic wills.[22] SB72, as introduced, passed the Senate and, if passed by the House and signed by Governor Pritzker, would have created the Electronic Wills and Remote Witnesses Act.[23] But once in the House, the entire bill was replaced by House Amendment 1 and modified again by House Amendment 2.[2425] After the amended SB72 was passed by the House, it returned to the Senate for concurrence. The amended bill related to prejudgment interest was not again read in the Senate before the Senate voted to concur with the House amendments. Yet, the Speaker of the House and the Senate President, as required by Article IV, Section 8(d) of the Illinois Constitution, certified that the procedure had been followed and sent the bill to the governor.[2627]

Article IV, Section 8(d) of the Illinois Constitution also provides that all "[b]ills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject."[28] Here, SB72 actually passed the Senate when the bill related to the entirely different subject of electronic wills. The procedure to amend to a different subject in the House and then return to the Senate for concurrence only (rather than three readings) also contributed to the three-readings issue that resulted.

These actions also implicate the enrolled bill doctrine. The Illinois Supreme Court has held that "upon certification by the Speaker and the Senate President, a bill is conclusively presumed to have met all procedural requirements for passage."[29] The court reached this conclusion despite stating that "the General Assembly has shown remarkably poor self-discipline in policing itself."[30] However, the Illinois Supreme Court did expressly reserve the right to reweigh the relative interests of separation of powers and the "importance of complying with the [Illinois] Constitution when passing bills" and potentially reach a different result if the legislature did not change its self-discipline in policing itself on the subject.[31]

At the end of this tumultuous path, House Amendment 2 to SB72 became Public Act 102-0006, which is now codified as section 2-1303(c) of the Code of Civil Procedure.[32]

Pertinent Provisions of the Act

Under Public Act 120-006, prejudgment interest applies to all personal injury and all wrongful death actions arising out of any theory of tort liability.[33] Prejudgment interest is calculated at a rate of 6% per year and applies to all categories of damages except punitive damages, sanctions, statutory attorney fees and statutory costs.[34]

The effective date of the Act is July 1, 2021.[35] For lawsuits filed after July 1, 2021, prejudgment interest is calculated from the date the action is filed.[36] For lawsuits filed before July 1, 2021, prejudgment interest is calculated from July 1, 2021.[37] For example, if a lawsuit was filed on September 1, 2021, then prejudgment interest began to accrue on September 1, 2021. But

if a lawsuit was filed on September 1, 2020, then prejudgment interest began to accrue on July 1, 2021.

When a plaintiff has voluntarily dismissed the lawsuit, prejudgment interest is tolled for the period that the action is voluntarily dismissed.[38] Prejudgment interest under the Act cannot be assessed against the State of Illinois, local government units, school districts, community college districts or any other governmental entity.[39] Additionally, prejudgment interest can only run for a maximum of five years.[40]

Very importantly, prejudgment interest can be reduced or eliminated by the highest written settlement offer made within twelve months of the effective date of the statute (for cases filed on or before July 1, 2021) or the filing of the action (for cases filed after July 1, 2021).[41] A qualifying offer must remain open for 90 days or be rejected by the plaintiff.[42] After 90 days, an offer may be withdrawn without prejudice to the reduction in prejudgment interest.

If the judgment is greater than the highest qualifying offer, then the plaintiff gets prejudgment interest only on the difference between the judgment amount and qualifying offer amount.[43] In contrast, if the judgment is less than or equal to the highest offer, then the plaintiff does not get prejudgment interest.[44]

For example, if the defendant makes a qualifying offer in the amount of $50,000 and the plaintiff receives a judgment in the amount of $75,000, then the plaintiff will only receive prejudgment interest on $25,000, the amount that the judgment exceeded the qualifying offer. However, if the defendant's highest settlement offer is $50,000 and the plaintiff receives a judgment of $50,000 or less, then the plaintiff will not receive prejudgment interest.

Impact of the Act

The Act will greatly affect how defendants handle pre-suit investigation. Given the limited amount of time to make a qualifying offer (twelve months), pre-suit investigation will have to be more robust and conducted quicker than normal. The twelve-month period to make a settlement offer is less than the time necessary to conduct fact discovery in most cases. Due to the twelve-month timeline to make a qualifying settlement offer, discovery deadlines and compliance with discovery will be even more critical to the parties.

Aggressive motion practice will be needed to efficiently secure the essential facts of the case. Additionally, in jurisdictions that require mandatory mediation, a mediation done within the first twelve months of a case will be problematic and probably ineffective. In reality, defense counsel will find themselves having to condense thirty-six months of work into the first twelve months. Internal processes of clients will need to be adapted, including client reporting guidelines. The Act poses many unanswered questions that most certainly will have to be addressed by the courts and maybe by the legislature.

Issues Not Addressed in the Act

Late Service and Lack of Service

Per the Act, prejudgment interest begins to accrue on the day the lawsuit is filed.[45] The Act does not provide for a tolling of prejudgment interest from the time a case is filed until the defendant is served. It also does not address when prejudgment interest begins to accrue against a defendant who is named after the suit was already filed but before the statute of limitations expires.

Under Illinois Supreme Court Rule 103(b), if a plaintiff "fails to exercise reasonable diligence" serving a defendant prior to the expiration of the statute of limitations, then the action as to that defendant may be dismissed without prejudice.[46] If the plaintiff fails to diligently serve a defendant after the statute of limitations expires, then "the dismissal shall be with prejudice as to that defendant."[47]

The plain language of Rule 103(b) states that "in considering the exercise of reasonable diligence, the court shall review the totality of the circumstances."[48] Due to the addition of prejudgment interest, the circumstances have now changed for defendants in personal injury and wrongful death cases. The delay of a plaintiff to serve a defendant was once a delay without any consequences for the defense. Now, the longer it takes for a plaintiff to serve a defendant, the more prejudgment interest the plaintiff will get and the less time the defendant will have to make a qualified offer.

— Continued on next page

Extensions to File Section 2-622 Reports

A plaintiff in a medical malpractice personal injury or wrongful death matter is required to file a report from a "reviewing health professional" at the time the complaint is filed attesting that there is a meritorious reason for filing the lawsuit.[49] The failure of a plaintiff to file a 2-622 report can be grounds for dismissal under 735 ILCS 5/2-619.[50]

If a plaintiff files an affidavit with the complaint stating the plaintiff was unable to obtain a 2-622 report before the expiration of the statute of limitations, the plaintiff is entitled to a 90-day extension to file the 2-622 report.[51] If the plaintiff files an affidavit with the complaint stating the plaintiff requested records but did not receive them within 60 days of the request, the plaintiff is entitled to a 90-day extension to file the 2-622 report "following receipt of the requested records."[52]

While a defendant is "excused from answering or otherwise pleading" until 30 days after the 2-622 report is filed,[53] the prejudgment interest amendment does not address or provide for tolling of prejudgment interest during the extension. Based on the plain language of the amendment, prejudgment interest begins to accrue on the day the suit is filed,[54] regardless of the status of the 2-622 report. The longer it takes for a plaintiff to file the 2-622 report, the more prejudgment interest the plaintiff will get and the less time the defendant will have to make a qualified offer.

> The Act will greatly affect how defendants handle pre-suit investigation. Given the limited amount of time to make a qualifying offer (twelve months), pre-suit investigation will have to be more robust and conducted quicker than normal.

Respondents-in-Discovery

Pursuant to 735 ILCS 5/2-402, a plaintiff may designate "those individuals or other entities, other than the named defendants, believed by the plaintiff to have information essential to the determination of who should properly be named as additional defendants in the action" as a respondent-in-discovery. The plaintiff then has six months to name the respondent-in-discovery as a defendant, but a plaintiff may request an additional extension up to 90 days "for good cause."[55]

The Act does not address when prejudgment interest begins to accrue against a defendant who was previously a respondent-in-discovery or when the 12-month timeframe to make a qualified offer starts for the newly-named defendant. Based on the plain language of the statute, the 12-month timeframe to make a qualified offer starts and prejudgment interest begins to accrue when the complaint is filed, but fairness would suggest that prejudgment interest and the 12-month time period to make a qualifying offer should only begin to accrue after the party is named a defendant (after the complaint is filed against the party).

Forum Non Conveniens Motions

Per 735 ILCS 5/2-101, a lawsuit must be filed either in the county where a defendant resides or in the county in which the cause of action arose. Motions to transfer a case for improper venue must be filed by a defendant within the time granted to answer or otherwise plead.[56]

Pursuant to Illinois Supreme Court Rule 187, "a motion to dismiss or transfer the action under the doctrine of *forum non conveniens* must be filed by a party not later than 90 days after the last day allowed for the filing of that party's answer."[57] "Hearings on motions to dismiss or transfer the action under the doctrine of *forum non conveniens* shall be scheduled so as to allow the parties sufficient time to conduct discovery on issues of fact raised by such motions."[58]

The discovery and briefing of the issues related to a *forum non conveniens* motion often can take six months to a year before the motion is ruled on, effectively eliminating substantive discovery during the 12-month timeframe to make a qualifying offer under the amendment and adding additional time to the lawsuit during which prejudgment interest is accruing.

Other Dismissals

While the amended prejudgment interest statute tolls the accrual of prejudgment interest during the time a personal injury or wrongful death case is voluntarily dismissed,[5960] it does not address dismissals for want of prosecution or other dismissals without prejudice.

Per 735 ILCS 5/13-217, if a case is dismissed for want of prosecution, the plaintiff "may commence a new action within one year or within the remaining period of limitation, whichever is greater."[61]

Fairness dictates that prejudgment interest accrue against a defendant only while the lawsuit is pending against that defendant. The 12-month timeframe for a defendant to make a qualifying offer should also only run while the lawsuit is pending against that defendant. Unfortunately, the amendment does not specify the same and carves out voluntary dismissals as the only exception to the accrual of prejudgment interest.

Due to the lack of any case law addressing the interplay between prejudgment interest and delays in serving a defendant or filing a 2-622 report, the defense should educate the judiciary in the form of Rule 103(b) or Section 2-622 motions to dismiss, as it is no longer reasonable to wait months to serve the defendant or to get a reviewing health professional to certify that there is a meritorious reason for the case. Forum issues, respondent-in-discovery conversions, and dismissals for want of prosecution are additional areas which may require motion practice due to the lack of specificity in the statute.

Practice tip: Defense counsel should liberally consider filing a Rule 103(b) motion to dismiss in cases where the defense was not served within 30 days of the case being filed. For medical malpractice cases, the defense should consider filing a motion to dismiss pursuant to 735 ILCS 5/2-622(g), as the plaintiff's failure to timely obtain a 2-622 report now prejudices the defense. For *forum non conveniens* motions, a defendant must now weigh which is more inconvenient—the forum or the potential additional prejudgment interest accruing while waiting for a ruling on a forum motion.

Constitutionality of the Act

Not long after the Act was passed, multiple defendants challenged the constitutionality of the statute. In Cook County, all challenges to the constitutionality of the Act have been consolidated before Judge Marcia Maras, who is hearing a comprehensive set of arguments in the lawsuit captioned *Hyland, et al. v. Advocate Health and Hosp. Corp., et al.*, 17 L 3541. As of the date of this writing, Judge Maras has not issued a ruling. Accordingly, only the respective positions of the parties are summarized below.

Ripeness

Defendants: The prejudgment interest statute impacts decisions prior to judgment. Most significantly, the additional exposure presented by prejudgment interest impacts settlement negotiations. Like *Best v. Taylor*, where the ripeness requirement was satisfied because the constitutional challenge controlled the course of future litigation, the present case is ripe.[62]

Plaintiffs: The issue is not ripe. Defendants do not owe prejudgment interest until after an adverse judgment is entered. In addition, if the verdict does not exceed a qualifying offer, then prejudgment is not owed. Accordingly, the issue is not ripe until prejudgment interest is actually owed after an adverse judgment that exceeds a qualifying offer. In this case, defendants have not consented to settle and may not owe any judgment at all, much less any prejudgment interest.

Standard of Review

Defendants: Every interference with a fundamental right, such as the right to trial by jury, requires strict scrutiny. The right to jury trial exists as to all damages issues,[63] and the assessment of damages is primarily a jury function.[64] Any change in the right to a jury trial, as enjoyed at common law and at the time of the 1970 Illinois Constitution, implicates a fundamental right.[65]

Plaintiffs: Rational basis review is appropriate. The Act is more similar to economic legislation and does not implicate a fundamental right. The Rhode Island Supreme Court considered this issue and decided that the state prejudgment interest law should be reviewed under the rational basis standard.[66]

— Continued on next page

Not long after the Act was passed, multiple defendants challenged the constitutionality of the statute.

Right to Jury Trial

Defendants: The right to jury trial is now conditioned on the payment of prejudgment interest, which did not exist at the time of the 1970 Illinois Constitution. Like the Illinois Supreme Court decision in *Kakos v. Butler*,[67] this statute involves an abrogation of the right to jury trial "as heretofore enjoyed" under the Illinois Constitution. The prejudgment interest law impedes on the jury function to determine all issues of fact related to plaintiff's damages.[68] Now, the jury no longer determines the amount of damages will make a plaintiff whole, including for any alleged economic loss prior to judgment.

Plaintiffs: Prejudgment interest is neither a measure of damages, nor a fact in controversy. Instead, it is an amount available to plaintiffs in 46 states, and no other state has held that prejudgment interest violates the right to trial by jury. The right to jury trial does not apply to creatures of statute, such as Consumer Fraud Act cases and section 2-1303(c). Both postjudgment costs and postjudgment interest statutes are constitutional. Finally, for more than 100 years, a line of cases has held that prejudgment interest is constitutional in contract cases.

Special Legislation

Defendants: The Illinois Constitution prohibits special legislation, which includes both laws that do not apply equally to all persons in similar situations and laws that confer a special privilege upon only a portion of people. This law applies only to personal injury and wrongful death defendants, not defendants who are found liable for other tortious conduct such as fraud, breach of fiduciary duty, or attorney malpractice. The law also excludes property damage claims, which involve liquidated damages that would be far more appropriate for prejudgment interest. As a result, a plaintiff who sues for both property damage and personal injury from the same accident would only recover prejudgment interest on the portion of the judgment attributable to the personal injury claim, not the entire claim. This law is the definition of special legislation.

Plaintiffs: Under the Illinois Supreme Court decision in *Nevitt v. Langfelder*, legislation may treat different classes of persons in different ways unless the disparity is due to "criteria wholly unrelated to the objective of that statute."[69] Here, the statute does not make an arbitrary classification. Instead, the statute has a reasonable relationship to a conceivable governmental purpose.[70]

The Act does benefit only personal injury or wrongful death plaintiffs and also excludes government defendants, but it does so for rational reasons. The statute aims to incentivize early settlements in these cases, relieve the court system from backlogs, and avoid overburdening governmental entities with additional litigation expenditures. In *Mikolajczyk v. Ford Motor Co.*, the Illinois Appellate Court First District rejected a challenge to a previous version of section 2-1303.[71] A similar result should follow here.

Three-Reading Rule

Defendants: The Illinois Constitution provides that a bill must be read by title on three different days in both the Illinois House and the Illinois Senate.[72] This constitutional requirement exists to keep Illinois senators and representatives attuned to the contents of bills.[73]

Although amendments that relate to the subject matter of the bill may be made without offending the three-reading rule, the amendments must be akin to the bill as originally introduced.[74] From January 29, 2021, through March 18, 2021, Senate Bill 72 was read three times in the Senate by its title, the Electronic Wills and Remote Witnesses Act.[75] On March 18, 2021, the bill was amended to remove all text and replace it with a proposed law related to prejudgment interest, which has nothing to do with electronic wills.[76] The bill then passed the Senate on March 25, 2021, without being read three times.[77] This is a plain violation of the Illinois Constitution.

Plaintiffs: The legislature followed the three-readings rule because SB72 was read three times in both houses from January 29, 2021, to March 18, 2021. The enrolled billed doctrine operates as a conclusive presumption that all procedural requirements for passage have been met.[78] To hold otherwise would violate separation of powers.[79]

Single-Subject Rule

Defendants: The Illinois Constitution requires that bills be confined to a single subject.[80] This rule allows the legislature to face public scrutiny. Courts consider both the legislative process and the resulting law in analyzing compliance with the single-subject rule. As SB72 first related to electronic wills and then was amended to address an entirely different subject, prejudgment interest, the single-subject rule was violated.

Plaintiffs: Courts look to the bill that was passed, not previous versions, in considering whether the single-subject rule was violated. Here, the bill was only two pages and titled: "An Act Concerning Civil Law." The only subject addressed was prejudgment interest. The Illinois Constitution contains the single-subject rule in order to prevent combining several bills into a single bill, as well as to facilitate orderly legislative procedures.[81] Courts should not so strictly read the single-subject rule as to prevent a bill from being amended to address a different, single subject.

Separation of Powers

Defendants: The assessment of damages is a jury function and part of the judicial sphere of authority that cannot be infringed upon by the legislature.[82] The arguments related to separation of powers are similar to the arguments related to right to a jury trial for all damages. The legislature should not usurp the function of the jury to determine just and reasonable compensation. This case is also similar to *Best*, where the Illinois Supreme Court invalidated legislation that impermissibly interfered with the judicial power to decide whether the jury fairly decided the amount of damages to compensate the plaintiff.[83] A jury verdict already considers the period of time between an injury and a judgment, and the judiciary should be permitted to decide whether a jury verdict represents fair compensation without prejudgment interest.

Plaintiffs: The right to interest on a judgment has traditionally been a legislative function. The legislature may also enact a statute that modifies an existing remedy when reasonably necessary.[84] The separation of powers doctrine does not completely prohibit the legislature from passing laws related to the judiciary.[85] A law violates separation of powers only if the law impermissibly encroaches on the judicial power or conflicts with an established judicial exercise of the judicial power.[86] Section 2-1303(c) does neither.

Double Recovery

Defendants: Making only a facial challenge to the law, the prejudgment interest represents a double recovery. This double recovery is most pronounced in cases involving future damages. Plaintiffs' reliance on out-of-state decisions do not reflect that the laws of other states preclude prejudgment interest for future damages[8788] or limit prejudgment interest to cases where the damages amount is easily ascertainable or liquidated, [89] prejudgment interest would be fair under the facts of the case, [909192] or the trial court has determined the parties' respective fault in delaying resolution of the case.[93]

Plaintiffs: Illinois jurors do not award damages for prejudgment interest. The Illinois Pattern Jury Instructions do not provide for prejudgment interest, and it would be error for a plaintiff to request prejudgment interest from a jury. The Texas Court of Appeals rejected a similar argument that awarding prejudgment interest on future damages amounts to a double recovery.[94]

Other Arguments

Defendants: Prejudgment interest places an undue burden on health care providers, in particular. This stands in opposition to several other legislative enactments aimed at steadying health care costs by, for example, requiring a report by a medical professional and limiting the time period to bring a medical malpractice action.

Several provisions of the law would also lead to unreasonable results. A

— Continued on next page

defendant could be precluded from a fair—or any—opportunity to make a qualifying offer due to delays in service, discovery not being commenced until all parties are required to appear under Illinois Supreme Court Rule 201(d), and delays in obtaining medical records. Plaintiff can obtain a benefit from delays that are directly attributable to the plaintiff's own inaction. And a defendant who is not named in the lawsuit until more than one year after the action is filed will be excluded from any opportunity to make a qualifying offer under the plain language of the Act.

Plaintiffs' analogy to postjudgment interest fails because postjudgment interest is markedly different from prejudgment interest. Postjudgment interest applies because a judgment debtor owes an ascertained amount and does not pay that amount. Conversely, the amount owed before a judgment in personal injury and wrongful death claims cannot be reasonably ascertained, as the damages are unliquidated.

Plaintiffs: The prejudgment interest law is an appropriate response to address concerns about delays in litigation and settlement offers made for the first time near the conclusion of a case. Because more than 95% of cases resolve without a trial, the legislature reasonably implemented the remedy of prejudgment interest. Settlement of claims should be encouraged, and the legislature properly balanced the respective rights of litigants on both sides in enacting prejudgment interest in Illinois.

Conclusion

From the legislative process to the present judicial challenges, enacting prejudgment interest in Illinois has been a controversial process. The Act significantly impacts several aspects of litigation, and the issues that were not decided or clarified in the Act remain significant. As the judiciary grapples with the issue of whether any constitutional infirmities invalidate the Act, practitioners and litigants should be well-versed in the intricacies of the Act.

(Endnotes)

1 101st Ill. Gen. Assem., House Bill 3360, Bill Status, https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3360&GAID=15&DocTypeID=HB&LegId=119866&SessionID=108&GA=101 (last visited April 7, 2022).

2 House Bill 3360, Bill Status, *supra* note 1.

3 101st Ill. Gen. Assem., House Bill 3360, Full Text, Introduced, https://www.ilga.gov/legislation/fulltext.asp?DocName=10100HB3360&GA=101&SessionId=108&DocTypeId=HB&LegID=119866&DocNum=3360&GAID=15&SpecSess=&Session= (last visited April 7, 2022).

4 101st Ill. Gen. Assem., House Bill 3360, Full Text, House Amendment 002, https://www.ilga.gov/legislation/fulltext.asp?DocName=10100HB3360ham002&GA=101&SessionId=108&DocTypeId=HB&LegID=119866&DocNum=3360&GAID=15&SpecSess=&Session= (last visited April 7, 2022).

5 101st Ill. Gen. Assem., House Bill 3360, Full Text, Senate Amendment 001, https://www.ilga.gov/legislation/fulltext.asp?DocName=10100HB3360sam001&GA=101&SessionId=108&DocTypeId=HB&LegID=119866&DocNum=3360&GAID=15&SpecSess=&Session= (last visited April 7, 2022).

6 House Bill 3360, Full Text, Senate Amendment 001, *supra* note 5.

7 *Id.*

8 *Id.*

9 102nd Ill. Gen. Assem., Senate Bill 0072, Full Text, House Amendment 001, https://www.ilga.gov/legislation/fulltext.asp?DocName=10200SB0072ham001&GA=102&SessionId=110&DocTypeId=SB&LegID=128357&DocNum=0072&GAID=16&SpecSess=&Session= (last visited April 7, 2022).

10 102nd Ill. Gen. Assem., Senate Bill 0072, Bill Status, https://www.ilga.gov/legislation/BillStatus.asp?DocNum=0072&GAID=16&DocTypeID=SB&LegID=128357&SessionID=110&SpecSess=&Session=&GA=102 (last visited April 7, 2022).

11 Senate Bill 0072, Full Text, House Amendment 001, *supra* note 9.

12 Senate Bill 0072, Bill Status, *supra* note 10.

13 *Id.*

14 102nd Ill. Gen. Assem., Senate Bill 0072, Full Text, House Amendment 002, https://www.ilga.gov/legislation/fulltext.asp?DocName=10200SB0072ham002&GA=102&SessionId=110&DocTypeId=SB&LegID=128357&DocNum=0072&GAID=16&SpecSess=&Session= (last visited April 7, 2022).

15 Senate Bill 0072, Bill Status, *supra* note 10.

[16] *Id.*

[17] *See* Letter from J.B. Pritzker, Governor, to the Members of the Illinois House of Representatives, 102nd General Assembly (March 25, 2021), https://www.ilga.gov/legislation/fulltext.asp?DocName=10100HB3360gms&GA=101&SessionId=108&DocTypeId=HB&LegID=119866&DocNum=3360&GAID=15&SpecSess=&Session= (last visited April 7, 2022).

[18] *See* Letter from J.B. Pritzker, *supra* note 17.

[19] Senate Bill 0072, Bill Status, *supra* note 10.

[20] Ill. Pub. Act. 102-0006 (eff. Jul. 1, 2021) (amending 735 ILCS 5/2-1303), https://www.ilga.gov/legislation/publicacts/fulltext.asp?name=102-0006&GA=102&SessionId=110&DocTypeId=SB&DocNum=0072&GAID=16&SpecSess=&Session= (last visited April 7, 2022).

[21] Ill. Const. 1970 art. IV, § 8(d).

[22] Senate Bill 0072, Bill Status, *supra* note 10.

[23] 102nd Ill. Gen. Assem., Senate Bill 0072, Full Text, Introduced, https://www.ilga.gov/legislation/fulltext.asp?DocName=10200SB0072&GA=102&SessionId=110&DocTypeId=SB&LegID=128357&DocNum=0072&GAID=16&SpecSess=&Session= (last visited April 7, 2022).

[24] Senate Bill 0072, Full Text, House Amendment 001, *supra* note 9.

[25] 102nd Ill. Gen. Assem., Senate Bill 0072, Full Text, House Amendment 002, *supra* note 14.

[26] Senate Bill 0072, Bill Status, *supra* note 10.

[27] Ill. Const. 1970 art. IV, § 8(d); Senate Bill 0072, Bill Status, *supra* note 10.

[28] Ill. Const. 1970 art. IV, § 8(d).

[29] *Geja's Café v. Metro. Pier & Exposition Auth.*, 153 Ill. 2d 239, 259 (1992).

[30] *Geja's Café*, 153 Ill. 2d at 260.

[31] *Id.*

[32] Ill. Pub. Act. 102-0006 (eff. Jul. 1, 2021) (amending 735 ILCS 5/2-1303), *supra* note 20.

[33] 735 ILCS 5/2-1303(c) (eff. Jul. 1, 2021).

[34] 735 ILCS 5/2-1303(c) (eff. Jul. 1, 2021).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Ill. S. Ct. R. 103(b) (eff. Jul. 1, 2007).

[47] Ill. S. Ct. R. 103(b) (eff. Jul. 1, 2007).

[48] *Id.*

[49] 735 ILCS 5/2-622 (eff. Aug. 9, 2013).

[50] *See* 735 ILCS 5/2-622(g) (eff. Aug. 9, 2013).

[51] 735 ILCS 5/2-622(a)(2) (eff. Aug. 9, 2013).

[52] 735 ILCS 5/2-622(a)(3) (eff. Aug. 9, 2013).

[53] 735 ILCS 5/2-622(a)(2)-(3) (eff. Aug. 9, 2013).

[54] 735 ILCS 5/2-1303(c) (eff. Jul. 1, 2021).

[55] 735 ILCS 5/2-402 (eff. Jan. 1, 2006).

[56] 735 ILCS 5/2-104(b) (eff. Sept. 23, 1983).

[57] Ill. Sup. Ct. R. 187(a) (eff. Jan. 1, 2018).

[58] Ill. Sup. Ct. R. 187(b) (eff. Jan. 1, 2018).

[59] 735 ILCS 5/2-1303(c) (eff. Jul. 1, 2021).

[60] 735 ILCS 5/2-1009(a) (eff. Jan. 1, 1994).

[61] 735 ILCS 5/13-217 (eff. Jan. 7, 1993).

[62] *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 382-84 (1997).

[63] *Haid v. Tingle*, 219 Ill. App. 3d 406, 410 (1st Dist. 1991).

[64] *Haid*, 219 Ill. App. 3d at 410.

[65] *People v. Williams*, 125 Ill. App. 3d 284, 287 (4th Dist. 1984).

[66] *Odens v. Schwartz*, 71 A.3d 438, 456-57 (R.I. 2013).

[67] *Kakos v. Butler*, 2016 IL 120377, ¶ 13

[68] *Haid*, 219 Ill. App. 3d at 410.

[69] *Nevitt v. Langfelder*, 157 Ill. 2d 116, 125 (1993) (quoting *Reed v. Reed*, 404 U.S. 71, 75-76 (1971)).

[70] *Cutinello v. Whitley*, 161 Ill. 2d 409, 420 (1994).

71 *Mikolajczyk v. Ford Motor Co.*, 369 Ill. App. 3d 78, 109 (1st Dist. 2006), *rev'd on other* grounds, 223 Ill. 2d 638 (2007).

72 Ill. Const. 1970 art. IV, § 8(d).

— Continued on next page

[73] *Giebelhausen v. Daley*, 407 Ill. 25, 47 (1950).

[74] *People v. Avery*, 67 Ill. 2d 187, 192 (1977).

[75] Senate Bill 0072, Bill Status, *supra* note 10.

[76] *Id.*

[77] *Id.*

[78] *Geja's Cafe*, 153 Ill. 2d at 259.

[79] *Id.*

[80] Ill. Const. 1970 art. IV, § 8.

[81] *Johnson v. Edgar*, 176 Ill. 2d 499, 514 (1997).

[82] *Best*, 179 Ill. 2d at 410.

[83] *Best*, 179 Ill. 2d at 413.

[84] *Wingert by Wingert v. Hradisky*, 2019 IL 123201, ¶ 33 (citations omitted).

[85] *De Luna v. St. Elizabeth's Hosp.*, 147 Ill. 2d 57, 68 (1992) (citation omitted).

[86] *De Luna*, 147 Ill. 2d at 69 (citation omitted).

[87] S.D. Codified Laws § 21-1-13.1.

[88] Tex. Fin. Code § 304.1045.

[89] *Windsor Sch. Dist. v. State*, 956 A.2d 528, 541 (Vt. 2008).

[90] *Myint v. Allstate Ins. Co.*, 970 S.W. 2d 920, 927 (Tenn. 1998).

[91] *Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St. 3d 421, 427 (1994) (prejudgment interest only if the defendant did not make a good faith effort to settle).

[92] *Lester v. Sayles*, 850 S.W. 2d 858, 874 (Mo. 1993) (prejudgment interest only if plaintiff made a settlement demand for an amount less than the judgment).

[93] *Craig v. Magee Mem'l Rehab. Ctr.*, 512 Pa. 60, 65-66 (1986).

[94] *Isern v. Watson*, 942 S.W. 2d 186, 199-200 (Tex. App. 1997).